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No. 81-1958

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

ARIZONA ELECTRIC POWER COOPERATIVE, INC.,
Petitioner,

v.

MID-LOUISIANA GAS COMPANY, et al.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

RESPONSE OF KENTUCKY WEST VIRGINIA GAS COMPANY, KANSAS-NEBRASKA NATURAL GAS COMPANY, INC. AND MICHIGAN WISCONSIN PIPE LINE COMPANY TO MOTION OF ARIZONA ELECTRIC POWER COOPERATIVE, INC. FOR CONTEMPORANEOUS CONSIDERATION AND DISPOSITION OF PETITIONS FOR CERTIORARI

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STATEMENT UNDER RULE 28.1

Pursuant to Rule 28.1 of the Rules of the Supreme Court, Kentucky West Virginia Gas Company, Kansas-Nebraska Natural Gas Company, Inc. and Michigan Wisconsin Pipe Line Company submit the following listing of the parent companies and subsidiaries of the companies filing this response:

Kentucky West Virginia Gas Company

Berea Gathering Company
Equitable Gas Company
Kentucky Hydrocarbon Company
Kepco, Inc.

Kansas-Nebraska Natural Gas Company, Inc.

Cap-Con International, Inc.
Energy Transportation Systems, Inc.
Excelsior Oil Corporation
Kan-Col Company of Kansas
Midlands Gas Corporation
Midlands Transportation Co.
North Central Energy Company
Northern Gas Company
Northern Mountain Gas Co.
Northern Utilities, Inc.
Slurco, Inc.
Western Alfalfa Corporation
Western Alfalfa Transportation Systems, Inc.
Western Gas Corporation
Wyoming Fuel Company

Michigan Wisconsin Pipe Line Company

American Natural LNG Company
American Natural Offshore Company
American Natural Resources Company
ANR Elba LNG Terminal Company
ANR LaSalle LNG Terminal Company
ANR Production Company

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Respondents, Kentucky West Virginia Gas Company, Kansas-Nebraska Natural Gas Company, Inc. and Michigan Wisconsin Pipe Line Company ("Pipelines") hereby respond to the motion filed in this proceeding by Arizona Electric Power Cooperative, Inc. ("AEPCO"), for contemporaneous consideration and disposition of the petitions for certiorari filed in Arizona Electric Power Cooperative, Inc. v. Mid-Louisiana Gas Co., et al., (No. 81-1958, filed April 23, 1982), and Pennzoil Co. v. Public Service Commission of West Virginia, (No. 81-1672, filed March 10, 1982). Pipelines submit that good cause has not been shown for contemporaneous consideration of these two cases and that AEPCO's motion should therefore be denied.

AEPCO first asserts that the Mid-Louisiana and Pennzoil cases are related and in conflict, alleging that both involve the same question as to the interpretation of the definition of a "first sale" in Section 2(21) of the Natural Gas Policy Act ("NGPA"), 15 U.S.C. §§3301, et seq., and that the West Virginia state court "expressly adopted, as the basis for its decision,"

the very order of the Federal Energy Regulatory Commission ("FERC") which was reversed and vacated by the U.S. Court of Appeals for the Fifth Circuit in Mid-Louisiana. It is not apparent, however, that the court in its one page order below in Pennzoil relied upon any definition of "first sale" in affirming the West Virginia regulatory Commission, since that Commission set forth several grounds for its decision and the West Virginia Supreme Court simply affirmed the Commission decision without specifying the grounds. In fact, the Public Service Commission of West Virginia has advised this Court that in its view the "West Virginia Supreme Court of Appeals did not adopt as the basis for its decision the order of the Federal Energy Regulatory Commission (FERC) which was reversed and vacated by the 5th Circuit in Mid-Louisiana." 1/ The West Virginia Public Service Commission determined that it could impose a rate on Pennzoil's sales of natural gas lower than the maximum lawful prices established in the NGPA on the alternative grounds of: (1) there was no "first sale" involved and (2) regardless of whether there was a "first sale" the West Virginia Commission had the power under Section 602 of the NGPA to prescribe lower maximum lawful prices for production within the state. 2/ Additionally, the West Virginia Commission also argued before the state court that aside from NGPA issues, the appeal by Pennzoil should be dismissed upon independent state grounds because Pennzoil failed to exhaust administrative remedies and failed to show that the

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1/ See "Response of the Public Service Commission of West Virginia to the Motion of Arizona Electric Power Cooperative, Inc., for Contemporaneous Consideration and Disposition of Petitions for Certiorari" filed herein on April 29, 1982, at 2. ("West Virginia Response").

2/ See Appendix B to Pennzoil Company's petition for certiorari in Pennzoil, supra, at 25b.

West Virginia Commission's overall rate determination was improper under the Court's standard of review. 3/

The state court below in Pennzoil simply did not reveal the basis for affirming the West Virginia Commission, nor any basis for presuming a conflict between the Pennzoil decision below and the Court of Appeals decision in the Mid-Louisiana case. 4/ Clearly, there is no reason for this Court to find a conflict when a conflict is not apparent and there are independent reasons which the West Virginia Court could have relied upon which would not result in a conflict with the Court of Appeals. In any event, if the decision below can be sustained on an independent or alternative ground, the fact that the decision conflicts with another appellate court does not constitute an adequate reason for the grant of certiorari. The Monrosa v. Carbon Black, Inc., 359 U.S. 180 (1959). In this regard, West Virginia has stated that it "views the Pennzoil case as involving separate legal grounds" from the Fifth Circuit's decision in Mid-Louisiana. 5/

Finally, Pipelines oppose AEPCO's inference in its motion that this Court should summarily reverse Mid-Louisiana. As will be more fully addressed in the Pipeline's briefs in opposition to AEPCO's petition for certiorari herein, this is clearly inappropriate where there was a unanimous holding in the Court below that the plain language, Congressional purpose and legislative history of the NGPA require that pricing of natural

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3/ See Brief of the Public Service Commission of West Virginia in Opposition to Petition for a Writ of Certiorari, filed on April 9, 1982, in Pennzoil, supra, at 8.

4/ The opinion of the West Virginia court is reproduced in Appendix A to Pennzoil Company's petition for certiorari filed in Pennzoil, supra, at 1a.

5/ West Virginia Response, at 2.

gas produced by an interstate natural gas pipeline is governed by the NGPA.

Respectfully submitted,

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May 5, 1982

CERTIFICATE OF SERVICE

I, James D. McKinney, Jr., a member of the Bar of this Court and counsel for Kentucky West Virginia Gas Company, do hereby certify that, on behalf of Kentucky West Virginia Gas Company, Kansas-Nebraska Natural Gas Company, Inc. and Michigan Wisconsin Pipe Line Company, I have this day served, in accordance with Rule 28 of the Rules of the Supreme Court of the United States, a copy of the foregoing response of Kentucky West Virginia Gas Company, Kansas-Nebraska Natural Gas Company, Inc. and Michigan Wisconsin Pipe Line Company to Motion of Arizona Electric Power Cooperative, Inc. for Contemporaneous Consideration and Disposition of Petitions for Certiorari, by first class mail, postage prepaid, upon the following:

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